OGC Has Reviewed

OGC 73-1035

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8 June 1973

MEMORANDUM FOR: Director of Personnel

SUBJECT: Warning Interviewees of Their Constitutional Rights

1. You requested the opinion of this Office as to whether the recent United States Court of Claims decision (No. 534-71, 16 Feb 1973) of Kalkines v. U.S. requires that the Office of Security, when interrogating employees, grant them immunity from subsequent criminal prosecution based on their answers or the fruits thereof. After a detailed review (OGC 73-1032) of Kalkines, the case law on which it is based, the subsequent case law, and the United States Code, it is our opinion that the Agency is not required nor has the legal authority to grant immunity and, therefore, may not grant it.

2. During the period of late 1971 and early 1972, this Office conducted a detailed review of the Agency's interviewing procedures, particularly with respect to warning an interviewee of his Miranda rights. We find nothing to indicate that the procedures established as a result of that review and in use today should be changed.

3. While an employee may be interrogated, if he refuses to answer claiming the fifth amendment privilege against self-incrimination, he must not be required to waive the privilege under threat of dismissal. To do so would allow him to claim infringement of his constitutional rights in a subsequent criminal prosecution or dismissal action. As is the current practice, when a situation

arises in which an employee refuses to answer under a claim of possible self-incrimination, the interrogations should stop and the matter should be referred to this Office for a determination of how to proceed.

STATINTL

Office of General Counsel

cc: D/Security
Inspector General

JED:ks

Distribution:
Original - Addressee
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OGC 73-1032

8 June 1973

MEMORANDUM FOR THE RECORD

SUBJECT: Warning Interviewees of their Constitutional Rights

1. The Director of Personnel requested the opinion of this Office as to whether the recent United States Court of Claims decision (No. 534-71, 16 Feb. 1973) of Kalkines v. U.S. requires that the Office of Security, when interrogating employees, grant them immunity from subsequent criminal prosecution based on their answers or the fruits thereof. After reviewing Kalkines, the case law on which it is based, the subsequent case law, and the United States Code, it is our opinion that the Agency is not required nor has the legal authority to grant immunity and, therefore, may not grant it.

2. As the Director of Personnel noted, a series of recent decisions has created a dilemma for most government employers. This dilemma is created by the restrictions that the courts have placed on statements or the fruits thereof that have been elicited from employees who are suspected of wrongdoing.

3. Some government bodies have the statutory authority to dismiss an employee if he fails to answer questions about his responsibilities or if he is convicted of certain criminal activities. Thus, until recently, the practice was to question the suspected employee about the wrongdoing. If he failed to answer he could be dismissed. If he incriminated himself or if his statements led to his incrimination, that evidence could be used against him in criminal proceedings and, if convicted, he could be dismissed. In 1967, the Supreme Court severely restricted this procedure in their decision of Garrity v. New Jersey, 385 U.S. 493.

4. In Garrity, police officers were being questioned about fixing traffic tickets. They were warned that they were entitled to remain silent and that any information that they gave might be used against them in a future criminal prosecution. They were also told that if they refused to answer they would be subject to removal from office. They made certain statements, no immunity was granted as there was no applicable immunity statute, and, subsequently, some of their statements were used to convict them for conspiracy to obstruct the administration of the traffic law. The Supreme Court held that the statements could not be used to convict the police officers and reversed the convictions stating at 385 U.S. 497 that:

> The choice given petitioners was either to forfeit their jobs or incriminate themselves. The option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent.... We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

5. Shortly after Garrity, another case, Gardner v. Broderick 392 U.S. 273 (1968), came before the Supreme Court. In Gardner, a policeman refused to waive immunity when brought before a grand jury investigating alleged bribery and police corruption. Because of his failure to waive immunity, he was dismissed pursuant to the New York City Charter. The Court found that the dismissal was improperly made, stating at 392 U.S. 278 that the policeman

> ...was discharged from office, not for failure to answer relevant questions about his official duties, but for failure to waive his constitutional right.

The Court concluded by stating at 392 U.S. 279:

> It is clear that petitioner's /the policeman's/ testimony was demanded before the grand jury in part so that it might be used to prosecute him and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.

Thus, the provision of the New York City Charter, which required the employee to waive his immunity or be dismissed, was declared unconstitutional.

6. Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation, 392 U.S. 280 (1968) /hereinafter cited as Sanitation I/, was a companion case to Gardner. In Sanitation I, twelve employees of the Department of Sanitation of New York City refused to testify in administrative proceedings for the investigation of corruption and another three refused to sign waivers of immunity in grand jury proceedings conducted for the same purpose. Pursuant to the same authority as in Gardner, all the employees were dismissed. The Court found that the dismissals were improperly made stating at 392 U.S. 283 "/t/hey were dismissed for invoking and refusing to waive their constitutional rights against self-incrimination". However, the Court added at 392 U.S. 284:

> . . . if New York had demanded that petitioners /the dismissed employees/ answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. (emphasis added).

Furthermore, the Court stated:

> . . . public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. . . . At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.

Thus, this case stands for the principle that an employee cannot be coerced to relinquish his privilege against self-incrimination as guaranteed by the fifth amendment of the Constitution by threat of dismissal from his job.

7. After the decision in Sanitation I, the employees were reinstated. New hearings were held in which the city granted immunity to the employees from subsequent criminal prosecution based on the use of their answers relating to their duties. The employees again refused to answer and they were again dismissed. In Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation, 426 F. 2d 619 (2d Cir. 1970) cert. denied 32 L. Ed. 2d 349 (1972) /hereinafter cited as Sanitation II/, the court upheld the dismissal stating at 426 F. 2d 626, that:

> To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights. (emphasis added).

Further, at 426 U.S. 627, the court stated:

> ...public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs; their right conferred by the Fifth Amendment itself, as construed in Garrity, is simply that neither what they say under such compulsion nor its fruits can be used against them in a subsequent prosecution.

Thus, it is clear from Sanitation II that one way, not necessarily the only way, to assure that the employee is not required to relinquish his entitlement to the benefits of the constitutional privilege is to grant him immunity from prosecution based on his statements or the fruits thereof.

8. In cases subsequent to Sanitation I, the federal district courts and courts of appeals seem to be construing its rationale very narrowly. Some cases have held that the employee has the immunity protection while others have ignored the question altogether. In Luman v. Tanzler, 411 F. 2d 164 (5th Cir. 1969), cert. denied 396 U.S. 929 (1969), a Florida policeman was suspended and state criminal charges were filed against him. The police authorities then proposed to hold an administrative hearing regarding the suspension. The policeman sought to have the hearing continued in view of the pendency of the criminal charges, which arose out of the same activity that gave rise to the suspension. The court denied granting an injunction to prevent the hearing, reasoning, that under Sanitation I, the policeman cannot be discharged for refusing to testify even though there was a department regulation which authorized dismissal for failure to testify because Sanitation I forearmed the policeman with the fact that he could not be discharged for refusing to testify and, thus, he did not face the choice of self-incrimination or job forfeiture. The court concluded that the departmental regulation could not be applied against the policeman. Thus, a hearing could be conducted, but the policeman would be free "...to admit, to deny or to refuse to answer...." without fear of dismissal. Therefore, notwithstanding the regulation, the court held that if the policeman refused to answer he could not be dismissed pursuant to the departmental regulation solely for failure to answer.

9. In Clifford v. Shoultz, 413 F. 2d 868 (9th Cir. 1969) cert. denied 396 U.S. 962 (1969), the court held that an employee of a Government contractor could be denied his security clearance for failure to answer questions related to personal beliefs and activities. The employee did not claim that the questions were self-incriminating, but failed to answer because he claimed the questions were "...incompetent, irrelevant, and immaterial." The court stated at 413 F. 2d 875 that Gardner and Sanitation I held that:

> ...a public employee may be discharged from his job if, without being required to waive immunity, he refuses to answer questions specifically, directly and narrowly relating to the performance of his official duties. An employee's invoking of his constitutional privilege would not in such a case be a bar to his dismissal from public employment.

Therefore, the employee, not having claimed the questions were self-incriminating, lost his security clearance for not answering.

10. In Grabinger v. Conlisk 320 F. Supp. 1213 (N. D. Ill. 1970), aff'd, 455 F. 2d 490 (7th Cir. 1972), two Chicago police officers were suspended for refusing to obey the direct order of their superior officer to submit to a polygraph examination without benefit of counsel. The court stated the police officers were not requested, prior to their refusing to take the polygraph examination, to waive any immunity or their privilege against self-incrimination. The court added at 320 F. 2d 1218:

> The net of Garrity, Broderick and Uniformed Sanitation Men is that if a public employee refuses to testify as to a matter concerning which his employer is entitled to inquire, he may be discharged for insubordination, but if he does testify his answers may not be used against him in a subsequent criminal proceeding.

The court found that the police officers "were not compelled to waive their constitutional right against self-incrimination as a condition of their employment". This case seems to say that the policemen were on notice that their statements could not be used in a subsequent criminal prosecution because of the holding in Garrity. The holding did not require a positive grant of immunity before the policemen could be dismissed for failure to submit to the polygraph.

11. In Bowes v. Commission to Investigate Allegations of Police Corruption, 330 F. Supp 262 (S. D. N. Y. 1971) four New York City policemen attempted to enjoin the commission from issuing subpoenas compelling police testimony. The court held that the subpoenas should issue because no action had been taken against the policemen--they had not been put in the position of having to make the choice of remaining silent or losing their jobs.

12. In Biehunik v. Felicetta, 441 F.2d 228 (2nd Cir. 1971), cert. denied 403 U.S. 932 (1971), a number of policemen attempted to enjoin the police commissioner from compelling their appearance in a lineup under pain of dismissal. The court cited Gardner and Sanitation I as holding at 441 F.2d 231 (note 3) that:

> ...dismissal of /a/ public employee for refusal to answer 'questions specifically, directly and narrowly relating to the performance of his official duties' /is/ not barred by /the/ fifth amendment.

The same court (the Court of Appeals, Second Circuit), which had only a year earlier decided Sanitation II, explained that the lineup was clearly and highly relevant to the legitimate end of assuring that the policemen were performing their assigned tasks in a trustworthy manner. The fact that the lineup may eventually result in a subsequent criminal matter did not dilute the potential usefulness of the lineup in administering disciplinary measures. The court concluded that to prohibit the lineup would unduly hamper the police officials in their difficult task of supervising and maintaining a dependable and trusted police force. Any prohibition would have little compensating gain to the policemen's individual rights. Accordingly, the injunction was not issued.

13. In Boulware v. Battaglia, 344 F. Supp. 889 (D. Del. 1972), a number of policemen were questioned by their superiors about their participation in a conspiracy directed against another city official. Later, they were given a formal departmental hearing, found guilty and penalized. The court in reviewing this action, citing Garrity, Gardner and Sanitation I, stated at 344 F. Supp. 906 that:

> Although the Supreme Court has held that a government entity cannot utilize the threat of dismissal to obtain a waiver of Fifth Amendment privileges, nor dismiss an employee for failure to waive such rights, it has held that the dismissal of a public employee, who has not been required to waive Fifth Amendment rights, for refusing to answer questions relating to the performance of his official duties is not violative of nor /does it/ place an impermissible burden upon that individual's exercise of his privilege against self-incrimination.

The court upheld the disciplinary action stating that no criminal prosecutions were commenced as a result of the hearings, which were departmental and therefore, civil in nature. The court, at 344 F. Supp. 901, stated:

> ...the mere prospect of later criminal prosecution does not preclude the maintenance of civil disciplinary proceedings in which the Constitution mandates the provision of the full panoply of rights afforded to those actually involved in such criminal investigations and prosecutions. To hold otherwise would prevent agencies such as the police from effecting internal disciplinary proceedings in any instance where the basis for disciplinary action also involved possible criminal prosecution....

14. The most recent decision in this line of cases is the Court of Claims' case of Kalkines v. U.S. There, a Bureau of Customs employee was being questioned about his accepting a payment from an importer's representative in return for favorable treatment on valuation of a customs entry. He failed to answer and was dismissed pursuant to the authorities in the Customs, Customs Personnel, and Treasury Manuals for failure to answer questions relating to the performance of his duties. During the period in which the Bureau of Customs was questioning the employee, the U.S. Attorney's Office was conducting a criminal investigation of the same matter. The court stressed the importance of this investigation stating:

> The most important fact bearing on the propriety of Mr. Kalkines' conduct at the interviews /at the Bureau of Customs/ is that, for all or most of the time, a criminal investigation was being carried on concurrently with the civil inquiry....

Relying on Garrity, Gardner and the two Sanitation cases, the court held that the Government, knowing that the civil proceeding was being conducted concurrently with the criminal proceeding, did not duly advise the employee of his options and the consequences of his choice and therefore, the employee was not adequately assured of protection against use of his answers or their fruits--granted use immunity--in

any criminal prosecution. The employee's failure to respond to the customs agents' questions was excused because the

> . . . agents' gave the employee very good reason to be apprehensive that he could be walking into a criminal trap if he responded to potentially incriminating questions. . . .

15. In summary, then, Garrity held that if an employee is confronted with the choice between the loss of his job because he remains silent and self-incrimination, any statements or the fruits thereof may not be used against him in a subsequent criminal prosecution. Sanitation I and II held that if granted immunity from subsequent criminal prosecution based on their statements, employees could be dismissed for failure to answer questions about their jobs. However, subsequent cases in the federal courts have not relied on the Sanitation doctrine to the extent that granting immunity is the only method of preventing self-incrimination. Therefore, we can conclude that those cases have not held that granting immunity is a prerequisite for subsequent dismissal. Kalkines held that the Government, having knowledge of a concurrent criminal investigation, did not take sufficient steps to properly insure that during a civil investigation the employee was informed that any statements he made would not be used against him in a subsequent criminal prosecution.

16. Agency employees are not entitled to the same dismissal procedural rights that most governmental employees are entitled to, because the Agency's authority for dismissing its employees is substantially broader than the dismissal authority of most other governmental bodies. Section 102(c) of the National Security Act of 1947, as amended, states:

> Notwithstanding the provisions of section 652 /now 7501/ of Title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem it necessary or advisable in the interests of the United States. . . . (emphasis added).

Black's Law Dictionary illustrates that discretion

> /W/hen applied to public functionaries, . . . means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others.

Thus, the Agency employee can be dismissed at the discretion of the Director and no formal grounds for dismissal are required to be established. In both Sanitation (I and II) and Kalkines, the employers had to show cause for dismissal--the failure of the employees to answer as to their duties as required by law. Therefore, one could make the argument that, as a consequence of Section 102(c), the Agency employee is not put in the position of having to make the Garrity choice because even if he gives a satisfactory explanation, he may still be dismissed at the discretion of the DCI. However, it is our opinion that as a practical matter the Agency employee is in a much more tenuous position than that of the normal government employee. The Court described the choice that the policemen in Garrity were forced to make as a choice "between the rock and the whirlpool". The choice for the Agency employee is even more hazardous because he can be dismissed even if "grounds" do not exist.

17. As the Agency employee is given a more difficult choice than in the cases discussed above, it seems clear that any statement made by him during an interrogation or the fruits thereof cannot be used against him in a subsequent criminal prosecution in view of the holding in Garrity. Therefore, the employee is granted use immunity notwithstanding the Agency's failure to formally notify him of this immunity. The question that remains then is, must the Agency grant immunity to the employee prior to interrogating him in order to be able to dismiss him subsequent to that interrogation?

18. Section 102(d)(3) of the National Security Act of 1947 provides "...that the Agency shall have no police, subpoena, law-enforcement powers or internal-security functions...." Accordingly, when the Organized Crime Control Act of 1970 (P.L. 91-452) was passed, although it granted the cabinet and military departments and 14 specific agencies of the Government the authority to grant immunity, it contained no immunity granting authority for the Agency. Lacking statutory authority to grant immunity, the Agency cannot grant it. In Sanitation II, the court noted there was no statute conferring immunity in Garrity, yet the court found that the employee could not be criminally prosecuted based on his statements or the fruits thereof. In effect, then, the court, using the authority of the fifth amendment, held that the employee is automatically granted use immunity when compelled to answer under pain of dismissal. As the Agency in any of its interrogations would not require the waiver of immunity as in Sanitation I the Agency employee is automatically protected by Garrity. Our internal investigations would be very similar to those in Grabinger, Biehunik and Boulware, none of which required further immunity granting statements. Following the procedures described below, we can not envision the circumstance under which an Agency employee would be in a situation similar to that in Kalkines, in which the employee is being questioned by an Agency interrogator, who has knowledge of a concurrent criminal investigation by the U.S. Attorney's Office.

19. Based on the very narrow construction that the district courts and courts of appeals have given to Sanitation I, the fact that the Supreme Court has denied certiorari in many of these cases, and the fact that composition of the Supreme Court has changed drastically since the time of Sanitation I it is our opinion that if an Agency employee brought an action against the Agency for improper dismissal, the court's decision as to whether he had been legally dismissed will be heavily influenced by the procedure used in the dismissal. Notwithstanding, it is our opinion that the Agency should continue to interrogate as we do today. In late 1971 and early 1972, this Office conducted a detailed review of the Agency's interviewing procedures, particularily with respect to warning the interviewee of his Miranda rights. We can find nothing that indicates that the procedures established as a result of that review and in use today should be changed. It is our understanding that those interrogation procedures are as follows:

a. If independent evidence suggests that an employee may be guilty of criminal activity, the interrogator is to consult this Office prior to interrogation, at which point a determination is made, in accordance with the procedures approved by the DDCI (OGC Memorandum, 64-1784, dtd 10 Jun 64), as to whether the matter should be referred to the Department of Justice for criminal prosecution.

b. In those situations in which independent evidence is not conclusive in showing that the employee is guilty of criminal conduct interrogations are conducted. If at any time during the course of the interrogation information is developed that leads the interrogator to even remotely suspect that the employee may be guilty of engaging in criminal activity, the interrogator interrupts the proceeding and reads the Miranda rights statement to the employee. If the interrogator has reason to question whether an activity or situation constitutes a violation of the criminal laws he is to stop the questioning and consult this Office. Based on the holding in Sanitation I, which said that the employee must not be required to relinquish his constitutional privilege against self-incrimination, it is our opinion that while an Agency employee may be interrogated, he may not be threatened with dismissal for failure to waive the privilege during that interrogation. Therefore, if an employee refuses to answer based on possible self-incrimination, the interrogator must not require the employee to waive the privilege under threat of dismissal. To do so would allow him to claim infringement of his constitutional rights in a subsequent criminal prosecution or dismissal action. As the Agency lacks authority to grant immunity, we cannot follow the procedure of Sanitation II of granting immunity to require the employee to answer under pain of dismissal. When a situation arises in which an employee refuses to answer under claim of possible self-

incrimination, the interrogations must stop and the interrogator should immediately refer the matter to this Office for a determination of how to proceed. If reasonably conclusive information is developed during the interrogation that suggests that the employee is guilty of criminal activity the interrogator should consult with this Office for a determination, as outlined in paragraph a above, as to whether the matter should be referred to the Department of Justice.

STATINTL

Office of General Counsel

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FEDERAL EMPLOYEES' NEWS DIGEST

EDITED BY JOSEPH YOUNG
GOVERNMENT COLUMNIST -- WASHINGTON (D.C.) STAR-NEWS

PUBLISHED IN WASHINGTON, D. C. ☆ DIRECTED TO FIELD PERSONNEL

Vol. 22, No. 35 | April 16, 1973 | Washington, D.C.

DECISION DISMAYS AGENCIES—The U.S. Court of Claims has issued a decision causing considerable dismay among federal and postal officials.

The ruling was that government employees suspected of wrongdoing in connection with their job cannot be fired for refusing to answer questions about their actions unless they are promised the answers would not be used against them in any criminal prosecution for their acts.

Thus, agencies are in a quandry when it comes to such cases as to what kind of action to take.

Only in cases where it promises such immunity, and the employee still refuses to answer questions can the government fire an employee and still retain its option to prosecute him on criminal charges.

If employees are not promised immunity, then they cannot be fired until after they are prosecuted and found guilty of a criminal offense. This could take years.

Federal personnel rules require employees to answer questions regarding their job conduct, with failure to do so subjecting them to firing. But the Court of Claims ruled that employees don't have to answer such questions unless they are told the question would not be used against them in any criminal proceeding.

The case involved a Bureau of Customs employee who was fired for refusing to answer agency investigators' questions regarding an alleged bribe. The U.S. Attorney ultimately dropped the case.

The Court of Claims found the employee was illegally fired because he wasn't promised that any answers he gave would not be used against him in any subsequent criminal proceeding.

The court held that to require federal employees to answer questions that would lead to criminal prosecution against them would violate their constitutional protection against self-incrimination. Ct.Cl. No. 534-71.

STILL ALIVE Still alive is the suit by the National Association of Internal Revenue Employees challenging President Nixon's action last year in delaying the October 1, 1972 federal white-collar pay raise to Jan. 1, 1973. Nixon contended the economic stabilization act gave him the right to postpone the pay raises.

NAIRE lost the case in federal district court and is now appealing the case to the U.S. Court of Appeals Court here. If by some chance NAIRE wins the suit, federal white-collar employees would get a three-month 5.14 percent retroactive pay raise. And it would also set up another pay raise next Oct. 1 instead of the Jan. 1, 1974 salary increase budgeted by Nixon.

TURNABOUT—Several weeks ago Postmaster General E. T. Klassen said he supported giving postal workers the right to strike if their unions quit running to Congress to get extra benefits.

However, when the House Postal Facilities subcommittee held hearings last week on legislation to give postal workers the right to strike, Klassen had changed his mind. He said he opposed the right to strike for postal workers.

Klassen also opposed legislation to establish a union shop in the Postal Service, although he said he might change his mind at a later date.

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM:
Director of Personnel
5 E 56 HQ

EXTENSION | NO.

DATE
24 APR 1975

STAT

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. STATINTL General Counsel 7 D 01 HQ	4/24			This problem comes up each time OS gets into interrogation of employees. Is this recent ruling sufficient basis for OGC to advise OS that henceforth employees who are being asked questions that could be self-incriminating should be advised that their answers will not be used against them if there is subsequent prosecution.
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STATINTL

Harry B. Fisher
Director of Personnel